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(SPACE BELOW FOR FILING STAMP ONLY)

Attorneys for Cross-Defendant
WESTERN INDUSTRIES, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ANDREW SHALABY, an individual, and
SONIA DUNN-RUIZ, an individual,

Plaintiffs,

v.

IRWIN INDUSTRIAL TOOL
COMPANY, et al.,

Defendants.

Case No. 3:07-CV-2107-W (BLM)

**ANSWER TO WORTHINGTON
CYLINDER ACQUISITION, LLC'S AND
WORTHINGTON CYLINDER
CORPORATION'S CROSS-CLAIM FOR
INDEMNIFICATION**

Judge: The Hon. Thomas J. Whelan

WORTHINGTON CYLINDER
ACQUISITION, LLC AND
WORTHINGTON CYLINDER
CORPORATION,

Cross-Claimants,

v.

WESTERN INDUSTRIES, INC.,

Cross-Defendant.

COMES NOW Cross-Defendant WESTERN INDUSTRIES, INC. ("WESTERN") and responds to WORTHINGTON CYLINDER ACQUISITION, LLC'S and WORTHINGTON CYLINDER CORPORATION'S (hereinafter jointly referred to as "WORTHINGTON") Cross-claim for indemnification as follows:

1. As to Paragraph 1 of the Cross-claim, WESTERN admits each and every

1 allegation contained therein.

2 2. As to Paragraph 2 of the Cross-claim, WESTERN admits each and every
3 allegation contained therein.

4 3. As to Paragraph 3 of the Cross-claim, WESTERN admits each and every
5 allegation contained therein and further alleges that there are further terms of said Agreement.

6 4. As to Paragraph 4 of the Cross-claim, WESTERN admits each and every
7 allegation contained therein.

8 5. As to Paragraph 5 of the Cross-claim, WESTERN admits each and every
9 allegation contained therein.

10 6. As to Paragraph 6 of the Cross-claim, WESTERN admits each and every
11 allegation contained therein.

12 7. As to Paragraph 7 of the Cross-claim, WESTERN denies jointly and
13 severally each and every allegation contained therein and specifically sets forth that there is no
14 evidence that has been developed that the MAPP gas cylinder which Plaintiff ANDREW
15 SHALABY was using at the time of the accident was manufactured by WESTERN.

16 8. As to Paragraph 8 of the Cross-claim, WESTERN denies the allegations
17 contained therein and specifically alleges that it is WESTERN that is entitled to indemnification
18 from WORTHINGTON as specifically alleged in its Cross-claim.

19 FIRST AFFIRMATIVE DEFENSE

20 9. As and for a first, separate and affirmative defense, Cross-defendant
21 alleges that the Cross-claim and each and every cause of action set forth therein fail to state facts
22 sufficient to constitute a cause of action against this answering Cross-defendant.

23 SECOND AFFIRMATIVE DEFENSE

24 10. As and for a second, separate and affirmative defense, Cross-defendant
25 incorporates the allegations contained in its Cross-claim, a copy of which is attached hereto as
26 Exhibit "A." Accordingly, Cross-defendant alleges that it is WESTERN that is entitled to be
27 fully indemnified and not WORTHINGTON.

28 ///

THIRD AFFIRMATIVE DEFENSE

11. As and for a third, separate and affirmative defense, Cross-defendant WESTERN alleges that Cross-claimant WORTHINGTON is in breach of its contract with WESTERN by not assuming WESTERN'S defense of this action after numerous requests for such defense have been made of WORTHINGTON.

WHEREFORE, Cross-Defendant WESTERN INDUSTRIES, INC., prays for judgment against WORTHINGTON as follows:

1. That WORTHINGTON be denied any of the claimed relief that it seeks in its Cross-claim;

2. That WESTERN be totally indemnified for any amount of any judgment that is rendered against WESTERN and for any amount expended by way of attorneys' fees, costs, interest and expenses incurred by WESTERN in the defense of the above-entitled action in an amount according to proof; and

3. For such other and further relief as the Court deems just and proper.

Dated: July 17, 2008

MCCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

By: s/ Lowell T. Carruth
Lowell T. Carruth
Attorneys for Cross-Defendant
WESTERN INDUSTRIES, INC.
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03664/00161-1249995.v1

EXHIBIT "A"
(TO ANSWER TO WORTHINGTON'S CROSS-CLAIM)

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Attorneys for Third-Party Defendant/Cross-claimant
WESTERN INDUSTRIES, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ANDREW SHALABY, an individual, and
SONIA DUNN-RUIZ, an individual,

Plaintiffs,

v.

IRWIN INDUSTRIAL TOOL
COMPANY, THE HOME DEPOT, INC.,
and DOES 2 through 100, inclusive,

Defendants.

WESTERN INDUSTRIES, INC.,

Cross-claimant,

v.

WORTHINGTON CYLINDER
ACQUISITION, LLC, and
WORTHINGTON CYLINDER
CORPORATION,

Cross-Defendants.

Case No. 07-CV-2107-W (POR)

**WESTERN INDUSTRIES, INC.'S CROSS-
CLAIM FOR INDEMNIFICATION**

Judge: The Hon. Thomas J. Whelan

COMES NOW Cross-claimant WESTERN INDUSTRIES, INC., and alleges as follows:

1. On or about September 17, 2004, Cross-claimant WESTERN INDUSTRIES, INC., and Cross-Defendants WORTHINGTON CYLINDER ACQUISITION, LLC, and WORTHINGTON CYLINDER CORPORATION entered into an Asset Purchase

1 Agreement, which was to be effective as of September 1, 2004.

2 2. Under the terms of said Agreement, Cross-claimant sold to Cross-
3 defendants its propane and specialty gas cylinder business, which included the manufacture and
4 sale of what is known as MAPP gas cylinders, which further included its contract with Newell
5 Operating Company to manufacture and sell BERNZOMATIC labeled cylinders containing
6 MAPP gas.

7 3. Other provisions in the contract involved the assumption of post-closing
8 liabilities. The contract provided as follows:

9 All liabilities and obligations arising out of the operations of business from
10 and after the closing date, including without limitation claims of third
11 parties for damages or injuries suffered as a result of defective products
12 produced by the business and sold by the purchaser on or after the closing
13 date. For purposes of this Section 1.09(f), any products with a manufacture
14 date of thirty (30) days prior to the closing date (the "manufacture cut-off
15 date") or later, as stamped on the product, shall be deemed to have been
16 sold by purchaser or one of its affiliates on or after the closing date.
17 Further, if such manufacture date cannot be ascertained from a stamp on
18 such product or otherwise and the relevant occurrence occurred on a date
19 that is ninety (90) calendar days after the closing date, such product shall be
20 deemed to have been sold by purchaser on or after the closing date.

21 4. In or about June, 2007, Plaintiffs ANDREW SHALABY and SONIA
22 DUNN-RUIZ filed a First Amended Complaint, a copy of which is attached hereto, marked as
23 Exhibit "A" and incorporated herein by reference.

24 5. In or about June, 2007, an Answer was filed by BERNZOMATIC and the
25 HOME DEPOT, INC. to said First Amended Complaint. Attached hereto and marked as Exhibit
26 "B" is a copy of said Answer.

27 6. In or about June, 2007, a Third-Party Complaint on behalf of
28 BERNZOMATIC, an unincorporated division of IRWIN INDUSTRIAL TOOL COMPANY, was
29 filed, naming WESTERN INDUSTRIES, INC., and WORTHINGTON INDUSTRIES as the
30 third-party defendants. Attached hereto and marked as Exhibit "C" is a copy of said Third-party
31 Complaint.

32 7. The accident which is referred to in all of said pleadings, occurred on April
33 21, 2006. Said accident occurred far beyond ninety (90) days from the closing date of the transfer

1 of the assets and liabilities from Cross-claimant to Cross-defendants. As set forth in the attached
2 pleadings, the date of manufacture of the cylinder in question cannot be ascertained since it has
3 been destroyed.

4 8. If it is determined that Cross-claimant is liable to Third-party Plaintiff
5 BERNZOMATIC on the basis of any contractual indemnity which existed in April 2006, then
6 Cross-claimant is entitled to be fully indemnified by Cross-defendants pursuant to the terms of
7 said written agreement.

8 WHEREFORE, Cross-claimant WESTERN INDUSTRIES, INC., seeks indemnity from
9 Cross-defendants including, but not limited to, any judgment which may be rendered against it
10 and further including, but not limited to, all attorneys' fees and costs which it may incur if it is
11 found responsible in any manner to Third-party Plaintiff BERNZOMATIC; for costs of suit
12 incurred in defending this matter; and for such other and further relief as the Court may deem just
13 and proper.

14 Dated: December 7, 2007

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

15
16
17 By: /s/ Lowell T. Carruth

Lowell T. Carruth
Attorneys for Third-Party
Defendant/Cross-claimant
WESTERN INDUSTRIES, INC.

18
19
20 03664/00161-1168559.v1

EXHIBIT A
(to Western Industries, Inc.'s Cross-Claim)

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9 Andrew Shalaby and Sonia Dunn-Ruiz

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 ANDREW SHALABY and SONIA DUNN-
13 RUIZ,

14 Plaintiffs,

15 vs.

16 IRWIN INDUSTRIAL TOOL COMPANY,
17 INC., THE HOME DEPOT, INC., and DOES
18 2 through 100, inclusive

19 Defendants.

Case No. C 06-07026 EDL

FIRST AMENDED COMPLAINT
(DEMAND FOR JURY TRIAL)

20 Plaintiffs Andrew Shalaby (hereinafter "Mr. Shalaby") and Sonia Dunn-Ruiz (hereinafter
21 "Ms. Dunn-Ruiz" – collectively "Plaintiffs"), by and through their attorneys, allege for their
22 First Amended Complaint against defendants Irwin Industrial Tool Company, Inc., a wholly
23 owned subsidiary of Newell Rubbermaid, Inc. (hereinafter "Irwin"), and The Home Depot, Inc.
24 (collectively ("Defendants")) as follows:

JURISDICTION AND VENUE

25 1. Plaintiffs are, and at all times were, residents of the City of El Cerrito, County of
26 Contra Costa, in the State of California.

27 2. Defendant Irwin Industrial Tool Company, Inc. is and at all times relevant to this
28 action was, a corporation organized and existing under the laws of the State of Delaware, with its

1 principal place of business in Huntersville, North Carolina, and is a wholly owned subsidiary of
2 Newell Rubbermaid, Inc. Plaintiffs are informed and believe, and thereon allege, that Irwin
3 Industrial Tool Company manufactures and distributes hand tools, power tools and accessories,
4 including MAPP Gas torches and MAPP Gas cylinders under the "BernzOmatic" brand name.

5 3. Plaintiffs are informed and believe, and thereon allege, that BernzOmatic is an
6 unincorporated division of Irwin Industrial Tool Company

7 4. Defendant The Home Depot, Inc. is, and at all times relevant was, a corporation
8 organized and existing under the laws of the State of Delaware, with its principal place of
9 business in Atlanta, Georgia. Plaintiffs are informed and believe, and thereon allege, that The
10 Home Depot, Inc. is a retail seller of hardware, appliances, building materials, gardening
11 materials, and other home improvement supplies, which operates stores throughout the United
12 States, including California, with stores in the cities of Emeryville (Alameda County) and El
13 Cerrito (Contra Costa County), California. The Home Depot, Inc. sells, among other things,
14 BernzOmatic Brand MAPP Gas torches.
15

16 5. Plaintiffs are ignorant of the true names and capacities of defendants sued herein
17 as DOES 2 through 100, inclusive, and therefore sues those defendants by such fictitious names.
18 Plaintiffs will amend this complaint to allege the true names and capacities of said defendants if
19 and when that information is ascertained.
20

21 6. Plaintiffs are informed and believe that at all times mentioned herein, defendants
22 and each of them were the agents, servants, joint venturers, authorized representatives, delegates
23 and/or successors of the other defendants named herein, and were acting within the course and
24 scope of said agency, service, joint venture, representation, delegation and/or succession.
25

26 7. The court has original jurisdiction of this action under 28 U.S.C. § 1332, based
27 upon the parties' complete diversity of citizenship, in that it is a civil action between citizens of
28

1 different states in which the amount in controversy exceeds the sum of \$75,000, exclusive of
2 interest and costs.

3 8. Venue is proper in the Northern District of California, pursuant to 28 U.S.C. §
4 1441(a), as well as Civil Local Rules 3-2 (c) and (d), on the grounds that this action was
5 commenced in the Superior Court of the State of California, in and for the County of Alameda,
6 and was subsequently removed to this Court by defendants pursuant to 28 U.S.C. § 1441(a).

7
8 **FACTUAL ALLEGATIONS**

9 9. Sometime in early to mid 2005, Mr. Shalaby purchased a BernzOmatic brand
10 MAPP Gas torch kit from a Home Depot store near his home in El Cerrito, California. The torch
11 kit included the two components of a BernzOmatic MAPP Gas torch: a yellow colored MAPP
12 Gas canister, or cylinder, and a torch head assembly ("torch"), the tip of which emits a flame
13 when the torch is in use. The flame is intended to be used for soldering, welding, and other
14 purposes that are described on the cylinder labels, on BernzOmatic internet website:
15 <http://www.bernzomatic.com>, and in other product related instructions and promotional
16 materials.

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18 10. The BernzOmatic torch is designed and intended to be screwed on to a threaded
19 metal neck of the MAPP Gas cylinder. Once attached to the cylinder, the torch is designed and
20 intended to be ignited when the user activates a trigger switch that is a part of the torch assembly.

21 11. Soon after Mr. Shalaby purchased the BernzOmatic torch kit from Home Depot,
22 he purchased several replacement BernzOmatic MAPP Gas cylinders from Home Depot and/or
23 Ace Hardware to use once the original cylinder that came with the torch kit was depleted of
24 MAPP Gas.

25
26 12. Plaintiffs and their two children are avid campers. They own a recreational
27 vehicle which they use on a regular basis to tour and park for overnight stays at designated
28 campgrounds that accommodate recreational vehicles.

1 13. While camping, Plaintiffs regularly light wood campfires in the evenings. Up
2 until April 21, 2006, Mr. Shalaby typically ignited the family's campfires by using his
3 BernzOmatic MAPP Gas torch to ignite the firewood. Mr. Shalaby stored the torch in a wooden
4 box, along with the auxiliary MAPP Gas canisters, which Plaintiffs kept inside of their
5 recreational vehicle.

6 14. The MAPP Gas torch kit contained a written representation that, among other
7 things, one of the intended and/or acceptable uses of the torch was for "lighting grills." By
8 making this representation, BernzOmatic intended for consumers to use its MAPP Gas torches to
9 start cooking and/or recreational campfires, and knew or should have known that some
10 consumers would use its torches in the manner that Mr. Shalaby used his torch at the time of the
11 incident which is the subject of this lawsuit, as set forth in more detail herein below.

12 15. Neither the torch nor the MAPP Gas cylinder contained a warning against using
13 the torch to ignite a wood campfire.

14 16. Defendants and each of them at all times herein mentioned knew and intended
15 that the BernzOmatic Brand MAPP Gas torches that they designed, manufactured, marketed and
16 sold would be purchased and used by consumers without the requisite knowledge of what
17 constitutes material defects in the product, and thus without inspection for defects therein or in
18 any of its component parts.

19 17. The MAPP Gas torch and/or cylinder at issue in this case was, at the time Mr.
20 Shalaby purchased it, defective and unsafe for its intended purposes in that the design,
21 manufacture and/or workmanship of the torch or its component parts were such that, without any
22 misuse of or abuse to the product on the part of the user, the contents of the cylinder allowed to
23 discharge instantaneously and become ignited upon activation of the torch ignition switch.

24 18. Between the date on which he purchased the MAPP Gas torch kit and April 21,
25 2006, Mr. Shalaby used the torch to ignite campfires on many occasions.
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1 **A. The Incident**

2 19. During the week of April 17, 2006, Plaintiffs were vacationing at the "Campland
3 on the Bay" recreational vehicle resort, located at 2211 Pacific Beach Drive in San Diego,
4 California.

5 20. On or about the evening of April 21, 2006, Mr. Shalaby was seriously injured
6 when he activated the trigger switch on his BernzOmatic MAPP Gas torch in order to light a
7 wood campfire in a designated campfire pit, located within the campsite at the Campland
8 complex where Plaintiffs were staying. Mr. Shalaby activated the trigger switch on the torch
9 when the MAPP Gas cylinder suddenly, instantaneously, and without warning, exploded and/or
10 discharged its contents, which caught fire. The heated MAPP Gas and fire enveloped Mr.
11 Shalaby, and caused severe burns to his face, limbs, and extremities.

12 **B. Ms. Dunn-Ruiz Witnessed the Incident**

13 21. Ms. Dunn-Ruiz was less than ten feet away from Mr. Shalaby when the
14 BernzOmatic cylinder exploded and/or instantaneously discharged its contents and enveloped
15 Mr. Shalaby in heated MAPP Gas and fire. While she had her back turned to her husband at the
16 moment the explosion and/or gas discharge occurred, Ms. Dunn-Ruiz heard the noise from the
17 explosion and/or gas discharged, and turned around within seconds to see her husband enveloped
18 in flames.

19 **C. Plaintiffs' Damages**

20 22. Mr. Shalaby was confined to a hospital for approximately three weeks after the
21 incident of April 21, 2006 involving the BernzOmatic torch and MAPP Gas cylinder, receiving
22 medical treatment for his injuries, including but not limited to painful skin grafts and surgeries,
23 as well as treatments for infections and other medical complications that were proximately
24 caused by the incident. Mr. Shalaby was bedridden for several weeks thereafter. During his
25 time in the hospital, Mr. Shalaby incurred in excess of \$300,000 in medical expenses, and he
26 continues to incur medical substantial expenses in connection with ongoing medical treatment
27 for his injuries.
28

1 23. At all times mentioned herein, Mr. Shalaby was and remains a self-employed
2 attorney at law with an active litigation practice. During the time he was confined to the
3 hospital, Mr. Shalaby was unable to work and, as a result, lost a substantial amount of income.
4 Since being discharged from the hospital, Mr. Shalaby's ability to resume his law practice has
5 been limited due to the physical and emotional injuries he sustained as a result of the April 21,
6 2006 incident involving the BernzOmatic torch and MAPP Gas cylinder. Mr. Shalaby was
7 recently able to resume practicing law on a limited basis, but he continues to lose a substantial
8 amount of business and income due to his limited ability to practice law on a full time basis. Mr.
9 Shalaby will continue to lose income as a result of the injuries he sustained from the
10 BernzOmatic MAPP Gas torch for an indefinite period of time.

11 24. Mr. Shalaby has suffered mental anguish and emotional injuries as a result of the
12 April 21, 2006 incident with the BernzOmatic torch and MAPP Gas cylinder, including but not
13 limited to Post Traumatic Stress Disorder, for which he has sought treatment. Mr. Shalaby has
14 incurred, and continues to incur, out-of-pocket expenses for the treatment of his emotional
15 injuries.

16 25. Ms. Dunn-Ruiz has suffered mental anguish and emotional injuries as a result of
17 witnessing her husband burn as a result of the April 21, 2006 incident with the BernzOmatic
18 torch and MAPP Gas cylinder while standing in close proximity to her husband.

19
20 **FIRST CAUSE OF ACTION -- STRICT PRODUCTS LIABILITY**
21 **(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)**

22 26. Plaintiffs incorporate by this reference the allegations, and each of them,
23 contained in paragraphs 1 through 25 above, as though fully set forth herein.

24 27. At all times mentioned in this complaint, the BernzOmatic Brand MAPP Gas
25 torch and/or cylinder that caused Mr. Shalaby's injuries and/or its component parts, were
26 defective as to design, manufacture, and warnings, which caused the torch, cylinder and/or their
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1 component parts to be in a dangerous and defective condition and prone to failure, which made
2 them unsafe for their intended use.

3 28. Plaintiffs are informed and believe that the torch and/or cylinder contained one or
4 more manufacturing defects when they left the possession of Irwin Industrial Tools, Home Depot
5 and/or DOES 2 through 100 (collectively "Defendants") in that the torch and/or cylinder differed
6 from the intended design and specifications, and/or from other typical units of the same product
7 line.

8 29. Plaintiffs are further informed and believe that the design of the BernzOmatic
9 torch and/or MAPP Gas cylinder that caused Mr. Shalaby's injuries was defective because the
10 torch and/or cylinder did not perform as safely as an ordinary consumer would have expected
11 them to perform when used in the manner that Mr. Shalaby did at the time of the April 21, 2006
12 incident which is the subject of this case.

13 30. Defendants, and each of them, designed, manufactured, distributed, marketed
14 and/or sold the torch and cylinder, and the torch and/or cylinder contained one or more
15 manufacturing and/or design defects when they left Defendants' possession.
16

17 31. As a direct and proximate result of the defective and dangerous condition of torch,
18 cylinder and/or their component parts as described above, Mr. Shalaby sustained the following
19 serious injuries and damages from using the torch in an intended manner:
20

21 a. Deep burns over 22% of his body surface, including his face, hands, arms
22 and legs, requiring surgical repair, skin grafts and continuing medical treatment;

23 b. physical pain and discomfort;

24 c. immobility;

25 d. disfigurement;

26 e. lost wages; and
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f. emotional trauma and mental anguish, including but not limited to Post Traumatic Stress Disorder.

SECOND CAUSE OF ACTION -- STRICT LIABILITY FOR FAILURE TO WARN
(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)

32. Plaintiffs incorporate by this reference the allegations, and each of them, contained in paragraphs 1 through 31 above, as though fully set forth herein.

33. The Bernzomatic torch and MAPP Gas cylinder that caused Mr. Shalaby's injuries lacked sufficient instructions or warnings of the potential risk and danger that the cylinder might suddenly and instantaneously discharge its contents and catch fire when used in an intended and foreseeable manner.

34. This danger and risk were known or should have been known to Defendants at the time the torch and MAPP Gas cylinder were designed, manufactured, distributed, marketed and sold.

35. These risks presented a substantial danger to purchasers and users of the torch that ordinary consumers would not have recognized or expected, particularly without an adequate warning.

36. Mr. Shalaby was injured when he used the torch in a manner that was intended and foreseeable to Defendants.

37. The lack of sufficient instructions or warnings was a substantial factor in causing Mr. Shalaby's injuries.

THIRD CAUSE OF ACTION – NEGLIGENCE
(By Mr. Shalaby Against Irwin Industrial Tools)

38. Plaintiffs incorporate by this reference the allegations, and each of them, contained in paragraphs 1 through 37 above, as though fully set forth herein.

1 39. Irwin Industrial Tools, whose BernzOmatic division designed, manufactured,
2 distributed, marketed and/or sold the BernzOmatic Brand torch and MAPP Gas cylinder that
3 caused Mr. Shalaby's injuries.

4 40. Irwin Industrial Tools was negligent in designing and/or manufacturing the torch
5 and MAPP Gas cylinder in that they failed to use the amount of care in designing and/or
6 manufacturing the torch and cylinder that a reasonably careful designer and manufacturer would
7 use in similar circumstances to avoid exposing others to a foreseeable risk of harm.

8 41. Mr. Shalaby was harmed as a proximate result of Irwin Industrial Tools'
9 negligence when the BernzOmatic Brand MAPP Gas cylinder exploded and instantaneously
10 discharged its contents upon Mr. Shalaby's activation of the torch trigger switch.

11 42. The negligence of Industrial Tools' was a substantial factor in causing Mr.
12 Shalaby's injuries.
13

14 **FOURTH CAUSE OF ACTION – NEGLIGENT FAILURE TO WARN**
15 **(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)**

16 43. Plaintiffs incorporate by this reference the allegations, and each of them,
17 contained in paragraphs 1 through 42 above, as though fully set forth herein.

18 44. Defendants, and each of them, were negligent by not using reasonable care to
19 adequately warn or instruct consumer's about the dangerous condition(s) in the BernzOmatic
20 Brand MAPP Gas torch's and/or cylinder that caused Mr. Shalaby's injuries, or about
21 circumstances that are likely to make the consumer's use of the torch dangerous.
22

23 45. Defendants, and each of them, knew or reasonably should have known that the
24 torch presented an unreasonable danger of exploding, or was likely to explode, when used in a
25 reasonably foreseeable manner.
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1 46. Defendants knew or reasonably should have known that users of the torch would
2 not realize this danger, yet failed to adequately warn of the danger or instruct users on the safe
3 use of the torch to prevent the type of injuries that Mr. Shalaby has sustained.

4 47. A reasonable designer, manufacturer, marketer, distributor and seller would have
5 warned of this danger, or instructed users on the safe use of the torch, to prevent that type of
6 injuries that Mr. Shalaby has sustained.

7 **FIFTH CAUSE OF ACTION – BREACH OF IMPLIED WARRANTY OF**
8 **MERCHANTABILITY**

9 **(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)**

10 48. Plaintiffs incorporate by this reference the allegations, and each of them,
11 contained in paragraphs 1 through 47 above, as though fully set forth herein.

12 49. Mr. Shalaby was proximately harmed by the BernzOmatic Brand torch and
13 MAPP Gas cylinder used in the April 21, 2006 incident because the torch and cylinder did not
14 have the qualities, reliability and safety that a reasonable consumer would expect.

15 50. At the time he purchased the torch, Defendants were in the business of selling
16 BernzOmatic Brand torches and MAPP Gas cylinders.

17 51. The BernzOmatic torch and MAPP Gas cylinder that caused Mr. Shalaby's
18 injuries were not of the same quality as those generally acceptable in the industry, and were not
19 fit for the ordinary purposes for which such products are used.

20 52. The failure of the torch to have the expected quality that it should have had was a
21 substantial factor in causing Mr. Shalaby's injuries.

22 **SIXTH CAUSE OF ACTION –**
23 **NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**
24 **(By Plaintiffs Against All Defendants)**

25 53. Plaintiffs incorporate by this reference the allegations, and each of them,
26 contained in paragraphs 1 through 52 above, as though fully set forth herein.

1 54. Defendants, and each of them, were negligent in designing, manufacturing,
2 distributing and selling the defective BernzOmatic Brand torch and MAPP Gas cylinder that
3 caused Mr. Shalaby's injuries.

4 55. Ms. Dunn-Ruiz was present at the scene of the April 21, 2006 incident involving
5 the explosion and/or instantaneous discharge of the contents of the MAPP Gas cylinder in Mr.
6 Shalaby's hands, when it occurred, and was aware at the time that her husband was sustaining
7 severe and life threatening injuries.

8 56. Both Mr. Shalaby and Ms. Dunn-Ruiz suffered serious emotional distress as a
9 result of experiencing and observing the April 21, 2006 incident, respectively, including severe
10 mental suffering, grief, anguish, anxiety, depression, worry, shock, and in the case of Mr.
11 Shalaby, Post Traumatic Stress Disorder.

12 57. The negligence of Defendants in designing, manufacturing, distributing,
13 marketing and selling the defective torch and/or MAPP Gas cylinder was a substantial factor in
14 causing Plaintiffs' serious emotional distress.
15

16 Wherefore, Plaintiffs DEMAND A JURY TRIAL, and pray that a judgment be entered
17 against Defendants, and each of them, as follows:
18

- 19 1. For general damages, including but not limited to damages for emotional distress,
20 pain and suffering, according to proof;
21 2. For special damages, including but not limited to out of pocket medical expenses
22 and incidental expenses related to Mr. Shalaby's injuries, and lost income, according to proof;
23 3. For exemplary damages;
24 4. For prejudgment interest according to law;
25 5. For costs of suit incurred in this action; and
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2 6. For any other and further relief that the court deems just and proper.
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4 Dated: June 11, 2007

ALBORG, VEILUVA & EPSTEIN LLP

5 /s/

6 By: _____

MARK D. EPSTEIN

Attorneys for Plaintiffs
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EXHIBIT B
(to Western Industries, Inc.'s Cross-Claim)

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Attorneys for Defendants, BERNZOMATIC, an Unincorporated Division
of Irwin Industrial Tool Company and THE HOME DEPOT, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANDREW SHALABY, an individual,)	CASE NO. C 06 7026 EDL
and SONIA DUNN-RUIZ, an)	
individual,)	Magistrate Judge Elizabeth D.
)	LaPorte
Plaintiffs,)	
)	ANSWER TO FIRST AMENDED
v.)	COMPLAINT BY BERNZOMATIC AND
)	THE HOME DEPOT, INC.
IRWIN INDUSTRIAL TOOL COMPANY)	
and THE HOME DEPOT, INC. and)	
DOES 2 through 100, inclusive,)	
Defendants.)	
)	

COME NOW, Defendants, Bernzomatic, an Unincorporated Division
of Irwin Industrial Tool Company, and The Home Depot, Inc., and
answer the First Amended Complaint of Andrew Shalaby and Sonia
Dunn-Ruiz on file herein by admitting, denying and alleging as
follows:

JURISDICTION AND VENUE

1. Answering paragraph 1, Defendants are without sufficient
knowledge or information to form a belief as to the truth of the
allegations contained in said paragraph, and on that basis, deny
each and every allegation contained therein.

-1-

ANSWER TO FIRST AMENDED COMPLAINT

EXHIBIT B

1 2. In response to paragraph 2, Defendants admit all
2 allegations contained therein.

3 3. In response to paragraph 3, Defendants admit all
4 allegations contained therein.

5 4. In response to paragraph 4, Defendants admit that
6 Defendant The Home Depot, Inc. is, and at all times relevant was,
7 a corporation organized and existing under the laws of the State
8 of Delaware, with its principal place of business in Atlanta,
9 Georgia. Defendants admit that The Home Depot, Inc., is a retail
10 seller of hardware, appliances, building materials, gardening
11 materials, and other home improvement supplies, and that it
12 operates stores throughout the United States, including
13 California, with stores in the cities of Emeryville (Alameda
14 County) and El Cerrito (Contra Costa County), California.
15 Defendants further admit that The Home Depot, Inc., sells, among
16 other things Bernzomatic brand MAPP Gas torches. Home Depot
17 U.S.A., Inc., is an indirect and principal operating subsidiary of
18 Defendant The Home Depot, Inc. Defendants deny each and every
19 remaining allegation of paragraph 4, except for those allegations
20 which are expressly admitted above.

21 5. In response to paragraph 5, Defendants are without
22 sufficient knowledge or information to form a belief as to the
23 truth of the allegations contained in said paragraph, and on that
24 basis, deny each and every allegations contained therein.

25 6. In response to paragraph 6, Defendants are without
26 sufficient knowledge or information to form a belief as to the
27 truth of the allegations contained in said paragraph, and on that
28 basis, deny each and every allegations contained therein.

1 7. In response to paragraph 7, Defendants admit all
2 allegations contained therein.

3 8. In response to paragraph 8, Defendants admit all
4 allegations contained therein.

5

6

FACTUAL ALLEGATIONS

7 9. In response to paragraph 9, Defendants admit the flame
8 from a Bernzomatic MAPP Gas torch is intended to be used for
9 soldering, welding, and other purposes that are described on the
10 cylinder labels, on Bernzomatic internet website:
11 <http://www.Bernzomatic.com> and in other product-related
12 instructions and promotional materials. Defendants deny all
13 remaining allegations of paragraph 9 on the basis that Defendants
14 are without sufficient knowledge or information to form a belief
15 as to the truth of the remaining allegations contained in said
16 paragraph, and on that basis deny each and every remaining
17 allegation contained therein.

18 10. In response to paragraph 10, Defendants admit all
19 allegations contained therein.

20 11. In response to paragraph 11, Defendants are without
21 sufficient knowledge or information to form a belief as to the
22 truth of the allegations contained in said paragraph, and on that
23 basis, deny each and every allegations contained therein.

24 12. In response to paragraph 12, Defendants are without
25 sufficient knowledge or information to form a belief as to the
26 truth of the allegations contained in said paragraph, and on that
27 basis, deny each and every allegations contained therein.

28 13. In response to paragraph 13, Defendants are without

1 sufficient knowledge or information to form a belief as to the
2 truth of the allegations contained in said paragraph, and on that
3 basis, deny each and every allegations contained therein.

4 14. In response to paragraph 14, Defendants admit that MAPP
5 Gas torch kits contained a written representation that, among
6 other things, one of the intended and/or acceptable uses of the
7 torches was for "lighting grills." Defendants deny each and every
8 remaining allegation contained in paragraph 14, except for the
9 allegation expressly admitted above.

10 15. In response to paragraph 15, Defendants admit that
11 neither torches nor MAPP Gas cylinders sold by Defendants
12 contained a warning against using their torches to ignite a wood
13 campfire. Defendants deny each and every remaining allegation
14 contained in paragraph 15, except for the allegation expressly
15 admitted above.

16 16. In response to paragraph 16, Defendants deny each and
17 every allegation contained therein.

18 17. In response to paragraph 17, Defendants deny each and
19 every allegation contained therein.

20 18. In response to paragraph 18, Defendants are without
21 sufficient knowledge or information to form a belief as to the
22 truth of the allegation contained in said paragraph, and on that
23 basis, deny each and every allegation contained therein.

24 19. In response to paragraph 19, Defendants admit all
25 allegations contained therein.

26 20. In response to paragraph 20, Defendants admit that, on
27 or about the evening of April 21, 2006, Mr. Shalaby was seriously
28 injured. Defendants deny each and every remaining allegation

1 contained in paragraph 20, except for the allegation expressly
2 admitted above.

3 21. In response to paragraph 21, Defendants are without
4 sufficient knowledge or information to form a belief as to the
5 truth of the allegations contained in said paragraph, and on that
6 basis, deny each and every allegation contained therein.

7 22. In response to paragraph 22, Defendants are without
8 sufficient knowledge or information to form a belief as to the
9 truth of the allegations contained in said paragraph, and on that
10 basis, deny each and every allegation contained therein.

11 23. In response to paragraph 23, Defendants are without
12 sufficient knowledge or information to form a belief as to the
13 truth of the allegations contained in said paragraph, and on that
14 basis, deny each and every allegation contained therein.

15 24. In response to paragraph 24, Defendants are without
16 sufficient knowledge or information to form a belief as to the
17 truth of the allegations contained in said paragraph, and on that
18 basis, deny each and every allegation contained therein.

19 25. In response to paragraph 25, Defendants are without
20 sufficient knowledge or information to form a belief as to the
21 truth of the allegations contained in said paragraph, and on that
22 basis, deny each and every allegation contained therein.

23
24 **FIRST CAUSE OF ACTION - STRICT PRODUCTS LIABILITY**

25 (By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)

26 26. Defendants incorporate by this reference the responses
27 contained in paragraphs 1 through 25 above, as though fully set
28 forth herein.

1 27. In response to paragraph 27, Defendants deny each and
2 every allegation contained therein.

3 28. In response to paragraph 28, Defendants deny each and
4 every allegation contained therein.

5 29. In response to paragraph 29, Defendants deny each and
6 every allegation contained therein.

7 30. In response to paragraph 30, Defendants admit that
8 Defendant, Irwin Industrial Tool Company designed, manufactured,
9 distributed, and marketed MAPP Gas torches under the "Bernzomatic"
10 brand name. Defendants admit that Irwin Industrial Tool Company
11 distributed and marketed MAPP Gas cylinders under the
12 "Bernzomatic" brand name. Defendants admit that The Home Depot,
13 Inc., sold Bernzomatic brand MAPP Gas torches and cylinders.
14 Defendants deny that the Bernzomatic brand torches and/or
15 cylinders contained manufacturing and/or design defects when they
16 left Defendants' possession. Defendants deny any other
17 allegations which may be included or implied in paragraph 30
18 except for those allegations expressly admitted above.

19 31. In response to paragraph 31, Defendants deny each of the
20 allegations contained therein with the exception of the
21 allegations of subparts a. through f., inclusive, which Defendants
22 deny on the basis that Defendants are without sufficient knowledge
23 or information to form a belief as to the truth of the allegations
24 contained in said subparts.

25
26 **SECOND CAUSE OF ACTION - STRICT LIABILITY FOR FAILURE TO WARN**

27 **(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)**

28 32. Defendants incorporate by this reference the responses

1 contained in paragraphs 1 through 31 above, as though fully set
2 forth herein.

3 33. In response to paragraph 33, Defendants deny each and
4 every allegation contained therein.

5 34. In response to paragraph 34, Defendants deny each and
6 every allegation contained therein.

7 35. In response to paragraph 35, Defendants deny each and
8 every allegation contained therein.

9 36. In response to paragraph 36, Defendants deny each and
10 every allegation contained therein.

11 37. In response to paragraph 37, Defendants deny each and
12 every allegation contained therein.

13

14 **THIRD CAUSE OF ACTION - NEGLIGENCE**

15 **(By Mr. Shalaby Against Irwin Industrial Tools)**

16 38. Defendants incorporate by this reference the responses
17 contained in paragraphs 1 through 37 above, as though fully set
18 forth herein.

19 39. In response to paragraph 39, Defendant admits that
20 Bernzomatic is a division of Defendant, Irwin Industrial Tool
21 Company, which designed, manufactured, distributed, marketed,
22 and/or sold Bernzomatic brand torches, and distributed and
23 marketed MAPP Gas cylinders. Defendants deny each and every
24 remaining allegation contained in paragraph 39 except for the
25 allegations expressly admitted above.

26 40. In response to paragraph 40, Defendant denies each and
27 every allegation contained therein.

28 41. In response to paragraph 41, Defendant denies each and

1 every allegation contained therein.

2 42. In response to paragraph 42, Defendant denies each and
3 every allegation contained therein.

4

5 **FOURTH CAUSE OF ACTION - NEGLIGENT FAILURE TO WARN**

6 (By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)

7 43. Defendants incorporate by this reference the responses
8 contained in paragraphs 1 through 42 above, as though fully set
9 forth herein.

10 44. In response to paragraph 44, Defendants deny each and
11 every allegation contained therein.

12 45. In response to paragraph 45, Defendants deny each and
13 every allegation contained therein.

14 46. In response to paragraph 46, Defendants deny each and
15 every allegation contained therein.

16 47. In response to paragraph 47, Defendants deny each and
17 every allegation contained therein.

18

19 **FIFTH CAUSE OF ACTION - BREACH OF**

20 **IMPLIED WARRANTY OF MERCHANTABILITY**

21 (By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)

22 48. Defendants incorporate by this reference the responses
23 contained in paragraphs 1 through 47 above, as though fully set
24 forth herein.

25 49. In response to paragraph 49, Defendants deny each and
26 every allegation contained therein.

27 50. In response to paragraph 50, Defendants admit each and
28 every allegation contained therein.

1 51. In response to paragraph 51, Defendants deny each and
2 every allegation contained therein.

3 52. In response to paragraph 52, Defendants deny each and
4 every allegation contained therein.

5 **SIXTH CAUSE OF ACTION - NEGLIGENT INFLICTION**

6 **OF EMOTIONAL DISTRESS**

7 **(By Plaintiffs Against All Defendants)**

8 53. Defendants incorporate by this reference the responses
9 contained in paragraphs 1 through 52 above, as though fully set
10 forth herein.

11 54. In response to paragraph 54, Defendants deny each and
12 every allegation contained therein.

13 55. In response to paragraph 55, Defendants are without
14 sufficient knowledge or information to form a belief as to the
15 truth of the allegations contained in said paragraph, and on that
16 basis, deny each and every allegation contained therein.

17 56. In response to paragraph 56, Defendants deny each and
18 every allegation contained therein.

19 57. In response to paragraph 57, Defendants deny each and
20 every allegation contained therein.

21

22 **FIRST AFFIRMATIVE DEFENSE**

23 58. Plaintiffs' First Amended Complaint herein, and each and
24 every cause of action therein, fails to state facts sufficient to
25 constitute a cause of action against these answering Defendants
26 upon which relief can be predicated.

27

SECOND AFFIRMATIVE DEFENSE

28 59. Plaintiffs' injuries and damages, if any, were caused in

1 whole or in part by their own lack of due care, and their recovery
2 herein, if any, should be correspondingly barred or reduced.

3 **THIRD AFFIRMATIVE DEFENSE**

4 60. Plaintiffs' injuries and damages, if any, were caused in
5 whole or in part by the acts and/or omissions of some third party
6 or third parties over whom these answering Defendants had no
7 control and for whose acts and/or omissions these answering
8 Defendants are neither responsible nor liable.

9 **FOURTH AFFIRMATIVE DEFENSE**

10 61. These answering Defendants' liability, if any, for non-
11 economic damages suffered by Plaintiffs shall be several only, and
12 not joint, and Defendants shall only be liable, if at all, for the
13 non-economic damages allocated to them in direct proportion to
14 their percentage of fault, if any, as more fully defined in
15 California Civil Code, Section 1431.2(a), et seq.

16 **FIFTH AFFIRMATIVE DEFENSE**

17 62. At all times relevant hereto, Plaintiffs failed and/or
18 refused to properly mitigate their damages, and their recovery
19 herein, if any, should be correspondingly barred or reduced.

20 **SIXTH AFFIRMATIVE DEFENSE**

21 63. At the time of the incident alleged in the First Amended
22 Complaint on file herein, the product therein described was/had
23 been altered, modified, and/or was in a condition different than
24 that in which it had left the possession of these answering
25 Defendants.

26 **SEVENTH AFFIRMATIVE DEFENSE**

27 64. At the time of the incident alleged in the First Amended
28 Complaint on file herein, the product therein described was/had

1 been damaged, abused, unforeseeably misused, and/or was not
2 properly maintained after it left the possession of these
3 answering Defendants.

4 WHEREFORE, Defendants, Bernzomatic, an Unincorporated
5 Division of Irwin Industrial Tool Company and The Home Depot,
6 Inc., pray judgment on the First Amended Complaint of Andrew
7 Shalaby and Sonia Dunn-Ruiz herein as follows:

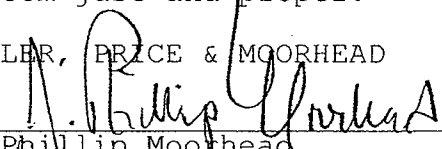
8 1. That Plaintiffs take nothing from these answering
9 Defendants by way of their First Amended Complaint herein;

10 2. That these answering Defendants be awarded their costs of
11 suit incurred herein;

12 3. That these answering Defendants be awarded such other and
13 further relief as the Court may deem just and proper.

14 DATED: June 19, 2007

KELLER, PRICE & MOORHEAD

15 
16 J. Phillip Moorhead
17 Attorneys for Defendants,
18 BERNZOMATIC, an Unincorporated
19 Division of Irwin Industrial Tool
20 Company and THE HOME DEPOT, INC.
21
22
23
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25
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27
28

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 Andrew Shalaby v. Bernzomatic/Home Depot, Inc.
4 CASE NO. C 06 7026 CW

5 PROOF OF SERVICE

6 I am employed in the county of Los Angeles, State of
7 California. I am over the age of 18 and not a party to the within
8 action; my business address is 229 Avenue "I", Second Floor,
9 Redondo Beach, California 90277.

10 On June 19, 2007, I served the foregoing document described as
11 **ANSWER TO FIRST AMENDED COMPLAINT** on all interested parties in this
12 action as set forth below:

13 Mark D. Epstein
14 Alborg, Veiluva & Epstein LLP
15 200 Pringle Avenue, Suite 410
16 Walnut Creek, CA 94596
17 (925) 939-9880 FAX (925) 939-9915
18 (Attorneys for Plaintiffs, Andrew Shalaby and Sonia Dunn-Ruiz)

19 FACSIMILE - by use of facsimile machine telephone number
20 (310)540-8480, I served a copy of the within document, to the by
21 facsimile numbers set forth above. The facsimile machine I used
22 complied with California Rules of Court, Rule 2004, and no error
23 was reported by the machine. Pursuant to California Rules of
24 Court, Rule 2006(d), I caused the machine to print a transmission
25 record of the transmission, a copy of which is attached to this
26 Declaration.

27 MAIL - I caused such envelope with postage thereon fully
28 prepaid to be placed in the United States mail at Redondo Beach,
California. I am "readily familiar" with the firm's practice of
collection and processing correspondence for mailing. Under that
practice it would be deposited with the U.S. Postal Service that
same day with postage thereon fully prepaid at Redondo Beach,
California, in the ordinary course of business. I am aware that on
motion of the party served, service is presumed invalid if postal
cancellation date or postage meter date is more than one day after
date of deposit for mailing in affidavit.

FEDERAL - I declare under penalty of perjury that the
foregoing is true and correct, and that I am employed in the office
of a member of the Bar of this Court at whose direction the service
was made.

Executed on June 19, 2007, at Redondo Beach, California.

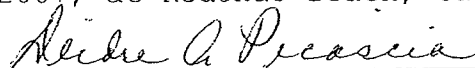

Deidre A. Picascia

EXHIBIT C
(to Western Industries, Inc.'s Cross-Claim)

Case 3:06-cv-07026-EDL Document 38 Filed 06/19/2007 Page 1 of 12

J. Phillip Moorhead, Esq. (SBN 99445)
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229 Avenue I, Second Floor
Redondo Beach, California 90277-5600
Telephone: (310) 540-1332

Attorneys for Defendant and Third Party Plaintiff, BERNZOMATIC, an
Unincorporated Division of Irwin Industrial Tool Company, and
Defendant, THE HOME DEPOT, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANDREW SHALABY, an individual,)	CASE NO. C 06 7026 EDL
and SONIA DUNN-RUIZ, an)	
individual,)	Magistrate Judge Elizabeth D.
)	LaPorte
Plaintiffs,)	
)	THIRD PARTY COMPLAINT ON
v.)	BEHALF OF BERNZOMATIC, AN
)	UNINCORPORATED DIVISION OF
IRWIN INDUSTRIAL TOOL COMPANY,)	IRWIN INDUSTRIAL TOOL COMPANY
THE HOME DEPOT, INC., and DOES)	
2 through 100, inclusive,)	
)	
Defendants.)	
)	
BERNZOMATIC,)	
)	
Cross-Complainant,)	
)	
v.)	
)	
WESTERN INDUSTRIES, INC.,)	
WORTHINGTON INDUSTRIES, AND)	
ROES 2 through 100, inclusive,)	
)	
Cross-Defendants.)	
)	
)	

For their Third Party Complaint against the Third Party
Defendants, Defendant/Third Party Plaintiff, Bernzomatic, an

1 Unincorporated Division of Irwin Industrial Tool Company
2 (hereinafter Bernzomatic), states as follows:

3 PARTIES

4 1. Defendant/Third Party Plaintiff, Bernzomatic, is a
5 Delaware corporation, with its principal place of business in
6 North Carolina.

7 2. Third Party Defendant, Western Industries, Inc., is a
8 closely-held corporation with its principal place of business in
9 Wisconsin.

10 3. Third Party Defendant, Worthington Industries, Inc., is
11 an Ohio corporation with its principal place of business in Ohio.

12 4. At various times, both Western and Worthington
13 manufactured and sold BernzOmatic-branded MAPP gas cylinders.

14 5. Worthington purchased Western's cylinder business in
15 September 2004.

16 JURISDICTION AND VENUE

17 6. Subject matter jurisdiction is proper in this Court
18 because federal district courts in California recognize the rights
19 of Third Party Complainant to Declarations of Rights, Breach of
20 Contract Claims, Contractual Indemnity, Common Law Indemnity and
21 Punitive Damages. This Court has Personal Jurisdiction over the
22 Third Party Defendants under the California long-arm statute as
23 the actions or failures to act by the Third Party Defendants
24 caused damage to the Defendant/Third Party Plaintiff and gave rise
25 to claims in California.

26 7. Venue is proper in this Court because all of the
27 Plaintiffs' litigation claims arose in this jurisdiction, and all
28 of the Third Party Complaint claims are derivative of those

1 litigation claims.

2 FACTUAL ALLEGATIONS

3 8. Defendant/Third Party Plaintiff, Bernzomatic, has been
4 named as a Defendant in the above-captioned lawsuit (the "Shalaby
5 litigation"). Plaintiffs filed suit on October 10, 2006 and
6 recently amended their Complaint on June 11, 2007.

7 9. The Joint Case Management Statement and Order entered on
8 February 20, 2007 alleges that Plaintiff, Andrew Shalaby, suffered
9 burns to his face and extremities due to an accident involving a
10 Bernzomatic-branded MAPP gas cylinder that he used to light a
11 campfire. It further alleges that liquid MAPP gas inside the
12 pressurized cylinder absorbed energy from the surrounding fire and
13 heated up such that it vaporized causing the cylinder to produce
14 "an explosive effect."

15 10. The Joint Case Management Statement and Order entered on
16 February 20, 2007 states that fire department personnel who
17 responded during the incident instructed the onsite manager to
18 discard the product. Depositions of fire department and onsite
19 personnel were taken on April 17, 2007 confirming that the product
20 had been discarded.

21 11. Third Party Defendants, Western and Worthington,
22 manufactured MAPP gas cylinders, such as the one allegedly
23 involved in this action.

24 12. Defendant/Third Party Plaintiff purchased MAPP gas
25 cylinders exclusively from Western and Worthington during the time
26 periods relevant to this action.

27 13. To the extent that a Bernzomatic-branded MAPP gas
28 cylinder was involved in the accident which forms the basis of

1 Plaintiffs' Complaint against Bernzomatic and Home Depot, said
2 MAPP gas cylinder was manufactured by either Western or
3 Worthington.

4 14. Defendant/Third Party Plaintiff cannot determine whether
5 Western or Worthington manufactured the MAPP gas cylinder involved
6 because the fire department personnel who responded during the
7 incident instructed the onsite manager to discard the product and
8 it cannot be recovered.

9 15. Upon information and belief, the written contract
10 between Worthington and Western regarding the sale of the cylinder
11 business in September 2004 contains an express provision setting
12 forth a method to facilitate identification of a cylinder's
13 manufacturer if it cannot be determined by a serial number or
14 other reliable information.

15 FIRST CLAIM - DECLARATION OF RIGHTS

16 16. Defendant/Third Party Plaintiff incorporates by
17 reference the allegations in Paragraphs 1 through 15 of this Third
18 Party Complaint as if fully rewritten herein.

19 17. Exclusive Supply Agreements between Newell Operating
20 Company (a predecessor to Industrial Tool Company, dba
21 Bernzomatic) and Western in 2001, as well as between Irwin
22 Industrial Tool Company, dba Bernzomatic, and Worthington in 2006
23 for Western's and Worthington's MAPP gas cylinders included
24 indemnification provisions. In September 2004, Worthington
25 assumed the rights and obligations of Western under the 2001
26 Supply Agreement resulting from Worthington's purchase of
27 Western's cylinder business at that time.

28 18. The indemnification provision at page 10 of the

1 Agreement between Newell (Bernzomatic) and Western states, in
2 pertinent part:

3 "Western assumes and agrees to indemnify, defend and
4 hold harmless Newell and its affiliates, directors,
5 officers, employees and agents for all claims against
6 Newell for personal injury or property damage to the
7 extent such injury or damage is alleged to be caused by
8 or is caused by the sale or distribution of Covered
9 Cylinders supplied under this Agreement that were not
10 suitable for sale, distribution or use due to the
11 design, manufacture, labeling or failure to label, or
12 storage prior to delivery to Newell of such Covered
13 Cylinders. Western further agrees to indemnify, defend
14 and hold harmless Newell and its affiliates, directors,
15 officers, employees and agents for all claims against
16 Newell resulting from the failure to manufacture
17 products in accordance with applicable laws including
18 environmental and labor laws."

19 19. The indemnification provision at page 8 of the Agreement
20 between Irwin Industrial Tool Company (Bernzomatic) and
21 Worthington states, in pertinent party:

22 "WCW [Worthington] assumes and agrees to indemnify,
23 defend and hold harmless BernzOmatic and its customers,
24 affiliates, directors, officers, employees and agents
25 for all claims against BernzOmatic for personal injury
26 or property damage to the extent such injury or damage
27 is alleged to be cause[d] by or is caused by in whole or
28 in part the sale or distribution of Covered Cylinders

1 supplied under this Agreement that were not suitable for
2 sale, distribution or use due to the design,
3 manufacture, labeling or failure to label (except as
4 provided in Section 4.4), or storage prior to delivery
5 to BernzOmatic of such Covered Cylinders. WCW further
6 agrees to indemnify, defend and hold harmless
7 BernzOmatic and its affiliates, directors, officers,
8 employees and agents for all claims against BernzOmatic
9 resulting from the failure to manufacture products in
10 accordance with applicable laws.

11 20. The allegations in the Shalaby litigation are for
12 personal injury caused by the sale or distribution of covered
13 cylinders - (a Bernzomatic-branded MAPP gas cylinder) -
14 manufactured and sold by Western and Worthington pursuant to the
15 Supply Agreements, which contained the above-cited indemnification
16 provisions.

17 21. Pursuant to the indemnification provisions, Bernzomatic
18 tendered its defense and indemnification to Western on June 19,
19 2006, and to Worthington on January 24, 2007.

20 22. To date, Western has neither defended nor indemnified
21 Bernzomatic, which is a breach of the indemnification provision in
22 the Supply Agreement.

23 23. To date, Worthington, has neither defended nor
24 indemnified Bernzomatic, which is a breach of the indemnification
25 provision in the Supply Agreement.

26 24. An actual dispute exists between Defendant/Third Party
27 Plaintiff and Plaintiffs, Andrew Shalaby and Sonia Dunn-Ruiz.

28 25. Bernzomatic is entitled to a declaration of rights under

1 the contracts against Western and Worthington and the obligations
2 under the indemnification provisions of the Supply Agreement as
3 follows:

4 a. Western is obligated under the indemnification
5 provisions of the Supply Agreement and by virtue of its breach of
6 its duty to defendant Bernzomatic in the Shalaby litigation, to
7 indemnify Bernzomatic with respect to the full amount of all
8 defense costs and any liability or settlement in the Shalaby
9 litigation without any cost sharing, apportionment between
10 particular claims or allegations, or limitation on amount.

11 b. Worthington is obligated under the indemnification
12 provisions of the Supply Agreement and by virtue of its breach of
13 its duty to defendant Bernzomatic in the Shalaby litigation, to
14 indemnify Bernzomatic with respect to the full amount of all
15 defense costs and any liability or settlement in the Shalaby
16 litigation without any cost sharing, apportionment between
17 particular claims or allegations, or limitation on amount.

18 SECOND CLAIM - BREACH OF CONTRACT/CONTRACTUAL INDEMNIFICATION

19 26. Defendant/Third Party Plaintiff incorporates by
20 reference the allegations in Paragraphs 1 through 25 of this
21 Complaint as if fully rewritten herein.

22 27. Western has breached its express and implied obligations
23 under the Supply Agreement because it has failed to defend and
24 indemnify Defendant/Third Party Plaintiff and hold it harmless
25 with respect to any of the amounts Defendant/Third Party Plaintiff
26 has incurred and will incur in the future because of the Shalaby
27 litigation.

28 28. Such breach of contract by Western has directly and

1 proximately caused injury to Defendant/Third Party Plaintiff,
2 including, but not limited to, the payment of the entire cost of
3 the Shalaby litigation and the payment of fees and expenses in
4 defending the Shalaby litigation.

5 29. Worthington has breached its express and implied
6 obligations under the Supply Agreement because it has failed to
7 defend and indemnify Defendant/Third Party Plaintiff and hold it
8 harmless with respect to any of the amounts Defendant/Third Party
9 Plaintiff has incurred and will incur in the future because of the
10 Shalaby litigation.

11 30. Such breach of contract by Worthington has directly and
12 proximately caused injury to Defendant/Third Party Plaintiff,
13 including, but not limited to, the payment of the entire cost of
14 the Shalaby litigation and the payment of fees and expenses in
15 defending the Shalaby litigation.

16 THIRD CLAIM - EQUITABLE INDEMNIFICATION

17 31. Defendant/Third Party Plaintiff incorporates by
18 reference the allegations in Paragraphs 1 through 30 of this
19 Complaint as if fully rewritten herein.

20 32. Third Party Defendants, Western and Worthington,
21 manufactured Bernzomatic-branded MAPP gas cylinders and introduced
22 those cylinders into the stream of commerce by selling them to
23 Defendant/Third Party Plaintiff.

24 33. To the extent that the MAPP gas cylinder at issue is
25 held to be defective, which Defendant/Third Party Plaintiff
26 expressly denies, one of the Third Party Defendants, Western
27 and/or Worthington, introduced that defect by manufacturing and
28 selling MAPP gas cylinders to Defendant/Third Party Plaintiff for

1 further distribution and resale to the Plaintiffs.

2 34. To the extent that the MAPP gas cylinder at issue is
3 held to have caused injuries and damages to Andrew Shalaby and
4 Sonia Dunn-Ruiz, which Defendant/Third Party Plaintiff expressly
5 denies, Third Party Defendants, Western and Worthington, are
6 liable for those injuries as a result of the manufacture and sale
7 of those MAPP gas cylinders to Defendant/Third Party Plaintiff for
8 further distribution and resale.

9 35. Because the cylinder product was discarded well before
10 any lawsuit or involvement of the Defendant/Third Party Plaintiff,
11 there is no way to discover whether Western or Worthington
12 manufactured the cylinder at issue.

13 36. Because it is certain that the manufacturer of the
14 cylinder at issue was either Western or Worthington, both Western
15 and Worthington owe indemnity to the Defendant/Third Party
16 Plaintiff for any alleged harm caused by the cylinder.

17 37. Thus, as a result of their actions, Third Party
18 Defendants, Western and Worthington, owe a complete common law
19 duty of indemnification to Defendant/Third Party Plaintiff for all
20 damages, costs, expenses and fees associated with the Shalaby
21 litigation.

22 FOURTH CLAIM - THIRD PARTY BENEFICIARY

23 38. Defendant/Third Party Plaintiff incorporates by
24 reference the allegations in Paragraphs 1 through 37 of this
25 Complaint as if fully rewritten herein.

26 39. Defendant/Third Party Plaintiff is an intended third
27 party beneficiary of the contract between Western and Worthington
28 for the sale of the cylinder business in September 2004, wherein

1 an express method was provided for determining which manufacturer
2 is responsible for a cylinder when it cannot be determined by
3 serial number or other reliable information.

4 40. As set forth in the First Claim, both Third Party
5 Defendants, Western and Worthington, separately contracted with
6 Defendant/Third Party Plaintiff, Bernzomatic, to defend and
7 indemnify Bernzomatic against claims involving cylinders
8 manufactured by each of them.

9 41. One purpose of the contractual provision to identify a
10 cylinder manufacturer in the absence of a serial number or other
11 reliable information is to insure that at least one of the
12 manufacturers will take responsibility for the manufacture of the
13 cylinder.

14 42. The identification of the cylinder manufacturer may be
15 necessary to enforce Defendant/Third Party Plaintiff Bernzomatic's
16 rights to a defense and indemnification as set forth in the First,
17 Second and Third Claims.

18 FIFTH CLAIM - ESTOPPEL

19 43. Defendant/Third Party Plaintiff incorporates by
20 reference the allegations in Paragraph 1 through 42 as if fully
21 rewritten herein.

22 44. Given the allegations in the Shalaby litigation that a
23 Bernzomatic-branded MAPP gas cylinder caused Plaintiff's injuries,
24 it is undisputed that either Western or Worthington manufactured
25 the MAPP gas cylinder.


26 45. If Plaintiffs are able to maintain an action against
27 Defendant/Third Party Plaintiff Bernzomatic for injuries, Western
28 and Worthington are estopped from denying responsibility for the

1 manufacture, sale and distribution of the Bernzomatic-branded MAPP
2 gas cylinder as it would lead to an unjust result.

3 WHEREFORE, Defendant/Third Party Plaintiff demands judgment
4 in its favor and against both Western and Worthington on all
5 counts for the full amount of all defense costs and any liability
6 or settlement in the Shalaby litigation, together with attorneys'
7 fees, costs, expenses and any other relief the Court deems
8 equitable and just.

9 DATED: June 19, 2007

KELLER, PRICE & MOORHEAD

10 
11 J. Phillip Moorhead
12 Attorneys for Defendant/Third
13 Party Plaintiff, BERNZOMATIC, an
14 Unincorporated Division of Irwin
15 Industrial Tool Company, and
16 Defendant, THE HOME DEPOT, INC.
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1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 Andrew Shalaby v. Bernzomatic/Home Depot, Inc.
4 CASE NO. C 06 7026 CW

5 PROOF OF SERVICE

6 I am employed in the county of Los Angeles, State of
7 California. I am over the age of 18 and not a party to the within
8 action; my business address is 229 Avenue "I", Second Floor,
9 Redondo Beach, California 90277.

10 On June 19, 2007, I served the foregoing document described as
11 **THIRD PARTY COMPLAINT** on all interested parties in this action as
12 set forth below:

13 Mark D. Epstein
14 Alborg, Veiluva & Epstein LLP
15 200 Pringle Avenue, Suite 410
16 Walnut Creek, CA 94596
17 (925) 939-9880 FAX (925) 939-9915
18 (Attorneys for Plaintiffs, Andrew Shalaby and Sonia Dunn-Ruiz)

19 FACSIMILE - by use of facsimile machine telephone number
20 (310)540-8480, I served a copy of the within document, to the by
21 facsimile numbers set forth above. The facsimile machine I used
22 complied with California Rules of Court, Rule 2004, and no error
23 was reported by the machine. Pursuant to California Rules of
24 Court, Rule 2006(d), I caused the machine to print a transmission
25 record of the transmission, a copy of which is attached to this
26 Declaration.

27 MAIL - I caused such envelope with postage thereon fully
28 prepaid to be placed in the United States mail at Redondo Beach,
California. I am "readily familiar" with the firm's practice of
collection and processing correspondence for mailing. Under that
practice it would be deposited with the U.S. Postal Service that
same day with postage thereon fully prepaid at Redondo Beach,
California, in the ordinary course of business. I am aware that on
motion of the party served, service is presumed invalid if postal
cancellation date or postage meter date is more than one day after
date of deposit for mailing in affidavit.

FEDERAL - I declare under penalty of perjury that the
foregoing is true and correct, and that I am employed in the office
of a member of the Bar of this Court at whose direction the service
was made.

Executed on June 19, 2007, at Redondo Beach, California.


Deidre A. Picascia

Peggy Maffei

From: efile_information@casd.uscourts.gov

Sent: Friday, December 07, 2007 3:25 PM

To: casd.uscourts.gov@casd.uscourts.gov

Subject: Activity in Case 3:07-cv-02107-W-POR Shalaby et al v. Newell Rubbermaid Inc et al Answer to Complaint

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Southern District of California

Notice of Electronic Filing

The following transaction was entered by Carruth, Lowell on 12/7/2007 at 3:25 PM PST and filed on 12/7/2007

Case Name: Shalaby et al v. Newell Rubbermaid Inc et al

Case Number: 3:07-cv-2107

Filer: Western Industries Inc

Document Number: 5

Docket Text:

Western Industries, Inc. 's ANSWER to Complaint with Jury Demand (Third-party Complaint), CROSSCLAIM for Indemnification against Worthington Cylinder Acquisition, LLC, Worthington Cylinder Corporation by Western Industries Inc. (Attachments: # (1) Cross-claim for Indemnification# (2) Exhibit A to Cross-claim# (3) Exhibit B to Cross-claim# (4) Exhibit C to Cross-claim)(Carruth, Lowell)

3:07-cv-2107 Notice has been electronically mailed to:

Lowell T Carruth lowell.carruth@mccormickbarstow.com, peggy.maffei@mccormickbarstow.com

Mark D Epstein mepstein@avelaw.com, callen@avelaw.com

3:07-cv-2107 Notice has been delivered by other means to:

Cathleen Shu-Chia Huang
Bowles & Verna
2121 N. California Blvd
Suite 875
Walnut Creek, CA 94596

J Phillip IMoorhead

12/7/2007

Keller Price and Moorhead
229 Avenue I
2nd Floor
Redondo Beach, CA 90277

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1106146653 [Date=12/7/2007] [FileNumber=2311330-0]
] [b921f3eaf9284f09c9fa3f9b0a9b2bf337811769dba14ac52b117343477a999d89e
ce854081b1f4fc7eeee9d05c896ea4212b4f66fff467c41c74ca94be0ca2e]]

Document description: Cross-claim for Indemnification

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1106146653 [Date=12/7/2007] [FileNumber=2311330-1]
] [97494cb0177969aadfd0177b8877b690bfd2b017a449c07461fb7c2c91a6699b60
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Document description:Exhibit A to Cross-claim

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1106146653 [Date=12/7/2007] [FileNumber=2311330-2]
] [b82237e42b5647917d89ed410752786999ef544e67b3cfe9ab84e90ac7830ca021e
c58ca4c4ac66c9ad5d5fe15aeea82a87e0ff2d5a0f8070cd2be331e37e480]]

Document description:Exhibit B to Cross-claim

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1106146653 [Date=12/7/2007] [FileNumber=2311330-3]
] [9c67981da39f310aae4e945840aca24edd25b08d451a85f5206b8106f350e31c7c2
f492c770986c4204c229bb91dddc2aa6b5503dbfeccfaf9bbbd1bfda2d686]]

Document description:Exhibit C to Cross-claim

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1106146653 [Date=12/7/2007] [FileNumber=2311330-4]
] [c3ddce99a8029fe0e2b957b4e1ec27f696c74a470b512dcb77816093bf47c0b7789
e297d8533493720fa51ea8b11cdb1f88e2bf6a203b67cd34673baef09f216]]

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is McCormick, Barstow, Sheppard, Wayte & Carruth LLP, 5 River Park Place East, Fresno, California 93720-1501. On July 17, 2008, I served the within documents:

ANSWER TO WORTHINGTON CYLINDER ACQUISITION, LLC'S AND WORTHINGTON CYLINDER CORPORATION'S CROSS-CLAIM FOR INDEMNIFICATION

☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☐ **BY PERSONAL DELIVERY:** by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☒ **BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Fresno, California addressed as follows:

Beth Schneider Naylor
Frost Brown Todd LLC
2200 PNC Center
201 E. Fifth St.
Cincinnati, OH 45202

Attorneys for Defendant Newell
Rubbermaid, Inc.

☒ **BY ELECTRONIC SUBMISSION:** per court order, submitted electronically by Verilaw to be posted to the website and notice given to the parties set forth below that the document has been served.

Mark D. Epstein, Esq.
Alborg, Veiluva & Epstein LLP
200 Pringle Ave., Ste. 410
Walnut Creek, CA 94596

Attorneys for Plaintiffs Andrew Shalaby and
Sonia Dunn-Ruiz

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Attorneys for Defendant/Third-Party Plaintiff
Bernzomatic and Defendant The Home Depot

Richard Ergo, Esq.
Bowles & Verna LLP
California Plaza
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P. O. Box 8180
Walnut Creek, CA 94596

Attorneys for Third-Party Defendant
Worthington Industries and Cross-
defendants/Cross-claimants Worthington
Cylinder Acquisition, LLC and Worthington
Cylinder Corporation

1 I am readily familiar with the firm's practice of collection and processing
2 correspondence for mailing. Under that practice it would be deposited with the U.S. Postal
3 Service on that same day with postage thereon fully prepaid in the ordinary course of business. I
4 am aware that on motion of the party served, service is presumed invalid if postal cancellation
5 date or postage meter date is more than one day after date of deposit for mailing in affidavit.

6 I declare that I am employed in the office of a member of the bar of this court at
7 whose direction the service was made. Executed on July 17, 2008, at Fresno, California.

8 
9 Peggy Maffei

10 03664/00161-1194831.v1
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